supply or attempt to supply such proof or rely on the evidence given in support of the charge, to show that the presumption does not arise.

If, therefore, a certain class of evidence is accepted as proof of the fact (a) that the woman is a prostitute, and (b) that the accused lived with her; then no higher quality of evidence should be required from the accused in rebuttal of the presumption which has so arisen against him. It is conceded by the prosecution in this case that there is no other evidence of the fact of prostitution during the period of the charge than that of the woman herself. Such evidence may be accepted without any corroboration, but it is always in the discretion of a Court to require corroboration (section 115 Evidence Ordinance); and in my view, a judge or magistrate sitting alone, without jury or assessors, is placed in a very difficult position, when called upon to say whether he should accept evidence from *tainted or dangerous sources* in the absence of corroboration.

The presumption having been held by the District Judge to arise it is necessary to consider what evidence there was of proof to the contrary. If, as I have indicated, the presumption is held to arise on the sole testimony of the woman, that is if it arises on a weak case, then it is not to be demanded of an accused person that the proof to the contrary should be overwhelmingly strong.

In this case evidence was led showing that the woman about a year ago had been a prostitute and that since that time she had lived with the accused as his mistress, that he had throughout the greater part of the time earnt sufficient or more than sufficient to support himself and that admittedly for a part of the time of their cohabitation he had supported his mistress. During the period January to June 1936 the woman alleged that she gave the man small sums daily, while on the other hand, evidence was led by the prosecution shewing that the man was in employment; while he stated that he had supported the woman and had tried to prevent her leaving the lodgings.

The question whether or not there was no proof to the contrary fell therefore to be decided simply upon how far the woman's evidence was, in the light of the circumstances, capable of being accepted in the sense that the guilt of the accused was not left as a mere balance of probabilities, but as established. In other words, was the presumption of guilt so strong that the evidence both of employment, and the cause of and the continuance of the accused's association with the woman of no value at all in rebutting that presumption, especially when the nature of the evidence which is accepted as raising the presumption is taken into account.

Clearly upon a comparison between her original complaint and her evidence in Court and upon consideration of her answers in cross-examination the woman cannot be accepted as an entirely satisfactory witness. Accepting her evidence without corroboration as establishing the presumption under subsection 3, which presumption is a disputable presumption in law, is one thing; accepting it as rebutting the evidence of the accused or the evidence of other witnesses which tend to show proof to the contrary is another. Because the rule is that where the conviction will rest upon, as it does here, the direct testimony of the woman alone; then, should there be any circumstances to impeach her credibility, the Court should look with extreme care at those circumstances as elements of doubt; *R.* v. *White*, 4 F. & F. 383.

The subsection 3 only raises a disputable presumption and if there is evidence disputing it, it cannot be said that it has become a conclusive presumption. Once there is evidence disputing the presumption, the prosecution is thrown back to its original duty of proving the case.

In this case the conviction appears to have proceeded upon a balance of probabilities which in the circumstances of the case—a criminal case —is wrong.

Appeal Allowed.

Solicitor for the Appellant—*Mark Morrison.*

[COURT OF CRIMINAL APPEAL]

TERRELL, Ag. C.J. CUSSEN, J. & LAVILLE, Ag. J.

September 22, 1937.

REX v. KAVENA ISMAIL SAHIB.

[SINGAPORE CRIMINAL APPEAL No. 6 of 1937]

Use of Chettiar vilasam—Presumptions therefrom.

Observations on the effect of the use of a Chettiar vilasam together with and as as part of the name of an individual chettiar.

The firm of R.M.K.R.M. v. *the firm of M.E.M.V.L.*, (1926) A.C. 61 commented upon.

CRIMINAL APPEAL.

Dr. Withers-Payne, for appellant.

Storr, Crown Counsel for respondent.

The facts and arguments appear sufficiently from the judgment.

The judgment of the Court (**TERRELL AG. C.J., CUSSEN J.**, and **LAVILLE AG. J.**) was delivered by—

TERRELL, AG. C.J.—The appellant was charged with criminal breach of trust in respect

of three tongkangs, and was convicted and sentenced in respect of two of such tongkangs, the Siru Medina and the Pulau Saigon.

On the appeal it was argued, amongst other things, that the learned trial Judge had misdirected the jury in certain respects, and that the verdict of the jury was unreasonable. In the opinion of the Court the learned Judge's summing up was eminently fair to the appellant: every point in the appellant's favour was put clearly before the jury, and it is quite impossible for this Court to say that there was not sufficient evidence upon which the jury could have found as they did.

Briefly the case against the appellant was that from 1920 onwards the appellant entered into various financial transactions with the money lending firm of A.T.K.P.L.N. of which the complainant, Muthia Chettiar, is now the sole proprietor, and of which Palaniappa, and later Meyappa, were the agents in Singapore. Promissory notes were given, and mortgages of various tongkangs were executed and registered, to secure the balances due on the promissory notes. In respect of the Siru Medina the mortgage was in favour of Palaniappa, and the promissory notes were also in his favour. The mortgage of the Pulau Saigon was in favour of Meyappa. In 1934 when Meyappa was again the agent accounts seem to have been gone into, and the previous promissory notes in favour of Palaniappa were replaced by two promissory notes in favour of Meyappa. Shortly afterwards the original Siru Medina and Pulau Saigon disappeared. The appellant alleged that they disappeared in the mud which is now part of the Kallang aerodrome. The prosecution however alleged that the ships were altered and their original numbers removed, and that they were re-registered as cargo boats in the names of persons other than the appellant, who was the registered owner when the mortgages were executed. It is clear from their verdict that the jury accepted the story of the prosecution.

An argument was put forward by Dr. Withers Payne on behalf of the appellant that in the case of the Siru Medina the original debt was in favour of Palaniappa, as was the mortgage to secure it, that the debt was a debt personal to Palaniappa and not a debt due to the firm, and that when in 1934 the promissory notes in favour of the agent Meyappa were substituted for the promissory notes in favour of Palaniappa, the debt in favour of Palaniappa was wiped out, and there was nothing left for the mortgage to secure. If accordingly there was an entrustment of the tongkang within the meaning of s. 405 of the Penal Code, the object of the entrustment had come to an end, and there was nothing left upon which to found a charge.

In the view of the case taken by the Court, this point is irrelevant, but the Court cannot accept counsel's argument that when a chetty's name appears on any document in conjunction with the vilasam of the firm, there is an irrebutable presumption that such chetty is the beneficial owner. Dr. Withers Payne submitted that this was the effect of the Privy Council case of *The firm of R.M.K.R.M.* v. *The firm of M.R.M. V.L.*, (1926) A.C. 61.

That case however only decided that when an agent of a firm signed a promissory note with the firm's vilasam, followed by his own name, he is personally responsible on such note. It was also decided that in such a case the promissee could sue either the firm or the agent, but that if judgment had been obtained against the agent, that would bar a further action for the same debt against the firm. There is nothing whatever in the Privy Council case to support the wide proposition submitted by appellant's counsel. In the present case Muthia was clearly proved to be the proprietor of the firm, and he was beneficially interested in the mortgages and in the promissory notes, irrespective of the name of the agent in whose favour such documents were executed.

The only point of substance in the appeal was that s. 405 of the Penal Code is not applicable to the facts as proved. The section reads:—

> "Whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use such property etc."

Now the mortgage of a tongkang is in essence more akin to an F.M.S. charge of land than to an English mortgage, where the legal estate is transferred to the mortgagee. Under the Merchant Shipping Acts the mortgagor of a tongkang remains the owner for the purpose of the Acts. All that the mortgagee acquires are certain rights, such as a power of sale, and a right under certain circumstances to take possession. The mortgagee's rights are certainly rights of property, but they are incorporeal rights. They are in no sense movable or corporeal property. There is no definition of "property," as distinct from movable property which is defined in s. 22 of the Penal Code. but in the opinion of the Court "property" for the purpose of s. 405 of the Penal Code must be something tangible, and a mere incorporeal right does not fall within the purview

of the section. There is the further difficulty that even if such incorporeal right could be the subject of criminal breach of trust, the mortgagee's rights were never "entrusted" to the appellant, and without such an "entrustment" a conviction under s. 405 cannot stand.

It is clear however that the verdict of the jury involved a finding that the appellant made away with the two tongkangs by altering them and registering them in other persons' names with a view to defrauding the complainant. The offence proved seems clearly to fall under s. 424 of the Penal Code in that the appellant was found to have dishonestly or fraudulently concealed or removed the two tongkangs in question. Sections 176 and 177 sub-s. 1 of the Criminal Procedure Code are accordingly applicable, and it was open to the jury to convict the appellant of the offence which he is shown to have committed although he was not charged with it.

Now s. 7 sub-s. 2 of the Court of Criminal Appeal Ordinance (Cap. 11) reads as follows:—

> "Where an appellant has been convicted of an offence and the jury could on the charge have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence is substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

For the reasons stated this Court is satisfied that the verdict of the jury involved a finding of the necessary facts which would constitute an offence under s. 424.

The verdict is accordingly set aside and a conviction on both charges under s. 424 substituted. As the maximum punishment under s. 424 is only two years, as compared with a maximum sentence of three years under s. 405, the sentence will be reduced to 12 month rigorous imprisonment on each charge such sentences to run concurrently.

Order accordingly.

Solicitors for the appellant.—*Drew & Napier.*

[APPELLATE CRIMINAL JURISDICTION]

GORDON SMITH, J.

September 24, 1937.

IN THE MATTER OF A CASE STATED UNDER S. 317 OF THE CRIMINAL PROCEDURE CODE BY THE MAGISTRATE, BUKIT MERTAJAM

and

IN THE MATTER OF YACOB BIN LEBAI MAT and PIN BIN WAHAB.

[PENANG SPECIAL CASE No. 24 of 1937]

Criminal Procedure Code, Ss. 76 and 78.

Hiding behind a coconut tree does not of itself bring anyone within the ambit of S. 76 sub-S. 1 (a) of the Criminal Procedure Code. There must not merely be the taking of precautions to conceal the presence but there must also be reasons to believe that such precautions are taken with a view to committing an offence.

CASE STATED.

The facts and arguments appear sufficiently from the judgment.

At the conclusion of the hearing the Judge discharged the order made and stated that he would give his reasons for so doing later and in writing.

F. GORDON SMITH, J.—This matter came before me on a case stated under S. 317 of the Criminal Procedure Code, by the Magistrate, Bukit Mertajam.

The point for determination was as to whether the provisions of Ss. 76 and 78 of the Criminal Procedure Code had been duly complied with in calling upon the abovenamed to shew cause why they should not be bound over in accordance with the provisions of S. 76.

The facts are that on an information laid against the said Yacob and Pin the Magistrate made an order in the following terms:—

> "Whereas information has been received by this Court at the Court House at Bukit Mertajam that Yacob bin Lebai Mat and Pin bin Wahab were found hiding behind a coconut tree at the compound of 50, Cross Street, at 10 p.m. on 4-7-37. It is hereby ordered that the said Yacob bin Lebai Mat and Pin bin Wahab do shew cause why they should not be ordered severally to execute a bond for their good behaviour in the sum of Fifty Dollars each to be in force for the term of six months with one sufficient surety each being a house-holder."

such order being duly signed, dated and sealed.

The relative provisions of s. 76 of the Criminal Procedure Code are as follows:—

(1) "Whenever it appears to a Police Court on information that (a) any person is taking